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No. 10-1256

In the Supreme Court of the United States

BILL CHAN,

Petitioner,

v.

CRAIG T. LUND, et al.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District

BRIEF IN OPPOSITION

KENNETH D. SIMONCINI, ESQ.
Counsel of Record
SIMONCINI & ASSOCIATES
1694 THE ALAMEDA
SAN JOSE, CA 95126
TELEPHONE: (408) 280-7711
FAX: (408) 280-1330
kds@simoncini-law.com

Counsel for Respondent Norma Tree Service

May 16, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Does California's mediation confidentiality law, California Evidence Code §§ 1119, 1123, violate the due process rights of a knowing participant to a valid, enforceable settlement agreement, even if the participant was never precluded from presenting evidence from the mediation, in support of his claim to set aside the settlement?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE PURSUANT TO RULE 29.6.

Norma Tree Service is a privately held entity and is not a subsidiary or affiliate of a publicly owned company. No parent or publicly owned company owns 10% or more of the membership interests of Norma Tree Service.

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SUMMARY OF REASONS TO DENY THE PETITION

Petitioner Bill Chan "Petitioner" has not established proper grounds to grant review by certiorari. First, Petitioner does not have standing to argue this action as he has not been injured by the statutes in question. Specifically, there was no order or ruling that prevented Petitioner from presenting evidence from the mediation. Such evidence, which includes the mediator's proposed testimony, was, in fact, considered by the court and is reflected on the record. Petitioner has thus posed a question for review not borne out of the facts and is effectively seeking an advisory opinion, based on a hypothetical factual scenario.

Second, Petitioner misrepresents the facts and record of this matter. Third, this case does not present an important question of law and does not have any far reaching implication for outside litigants. Moreover, Petitioner attempts to manufacture a conflict of law, where no such conflict exists. Finally, the ruling from the California Court of Appeals was correct and should not be reviewed.

STATEMENT OF CASE

The instant action stems from a complaint filed on October 05, 2006, in Santa Clara County Superior Court, State of California, by Petitioner against Respondents Craig T. Lund and Kathleen Marie Lund and Norma Tree Service. Petitioner alleged Respondents wrongfully trimmed several cypress trees, which purportedly had branches that extended from Petitioner's property.

On August 04, 2008, the parties attended a private mediation to resolve the matter short of trial, before Mediator Kevin Kelly "Mediator Kelly". Petitioner was represented by David Packard "Packard". The parties were able to reach a settlement agreement, which was reduced to writing at the mediation and signed by all parties. Pet. App. 44-47[1]. The writing included many specific terms, agreed upon by the parties and known to Petitioner. Once the settlement was reached, Mediator Kelly explained each and every aspect of the settlement to the parties, including Petitioner, before the agreement was executed. This included an explanation of California law with respect to mediation confidentiality. Up to and including the time the settlement was entered into, Petitioner proffered no evidence regarding coercion or extortion by Packard or that he was an unwitting party to the settlement. Resp. App[2] at 1b-8b.

Thereafter, the parties proceeded to effectuate the settlement. On August 05, 2008, Petitioner sent a letter, attaching his W-9 form, in connection with the issuance of the settlement draft. Petitioner made no mention of any irregularities in the settlement proceedings. Resp. App. at 9b-14b.

On August 12, 2008, Packard stated that he and Petitioner reviewed the settlement agreement and, aside from one reservation regarding injunctive relief, found the document satisfactory. Again, neither

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[1] Pet. App. refers to the Appendix attached to Petitioner's Petition for Writ of Certiorari.

[2] Resp. App. refers to the Appendix to this Opposition filed by Respondent Norma Tree Service.

Packard nor Petitioner expressed any concern about the validity of the settlement.

Suffering from apparent "buyer's remorse", on September 19, 2008, Respondent received a letter indicating that Petitioner had substituted in new counsel, Bruce Tichinin "Tichinin", who submitted a declaration to the Court, requesting the Court not dismiss the suit as the settlement had not been freely obtained. Tichinin indicated, for the first time, that Packard committed fraud by threatening to abandon Petitioner at trial, if he failed to attend the mediation.

On November 13, 2008, following hearing and argument, the trial court granted the motion to enforce the settlement, pursuant to California Code of Civil Procedure § 664.6. The court noted there was no evidence to corroborate Petitioner's allegations that Packard coerced him into settling; no evidence to indicate Respondents knew of any such improper or unfair dealings between Petitioner and Packard. Pet. App. at 39-42.

On November 25, 2008, Petitioner filed an ex parte application asking the court to reconsider its ruling on the motion to enforce the settlement. He asserted there was additional evidence, including a letter from Petitioner to Packard, wherein Packard indicated that he would reduce his fees by $10,000.00. It is uncertain how this furthered Petitioner's position.

On December 11, 2008, Petitioner submitted a supplement to his ex parte application, wherein he argued that if Mediator Kelly were allowed to testify, he could corroborate certain statements made by

Packard, which would support Petitioner's claims of coercion, fraud, duress etc.

On December 22, 2008, the trial court issued an order denying Plaintiff's Ex Parte Application, stating that Plaintiff did not file a motion for reconsideration under California Code of Civil Procedure § 1008. The Court stated reconsideration was not warranted. The record was augmented to include the letter from Packard, regarding a reduction of fees. The court did not apply the mediation statutes in reaching its holding.

On March 11, 2009, Petitioner filed a second ex parte application to set aside the settlement, including an offer of proof. The offer of proof delineated what Mediator Kelly would testify to, if allowed, and how it would support the motion to set aside the settlement. The Court considered the proposed testimony of Kevin Kelly and still found no reason to disturb the settlement agreement.

The court responded to the offer of proof regarding the proposed testimony from Mediator Kelly and held:

> **THE COURT:** *Let's assume we have that testimony from Mr. Kelly entirely supporting the plaintiff's claim.* I don't think in the law the defendants lose their deal. They've got a deal with the plaintiff. This is a case for money...I see no reason since then to rethink this, to reconsider it, whether on plaintiff's motion or on the Court' own motion, so I'm going to deny the ex parte application...Resp. App. 18b-21b.

The trial court, signed the order to enforce the settlement.

Petitioner appealed to the California Court of Appeals. In *Chan v. Lund,* 188 Cal.App.4th 1159 (2010), the California Court of Appeals ruled on the following issues presented by Petitioner: (1) the settlement is void due to fraud and contravenes public policy, (2) Petitioner is entitled to rescind the settlement agreement under theories of economic duress, undue influence, and fraud and, (3) Evidence Code provisions concerning the confidentiality of communication during mediation deprived Petitioner of due process.

Of particular relevance to the instant petition, the California Court of Appeals found Petitioner's due process argument without merit. The Court noted, in its opinion that:

> "The record fails to disclose that the court specifically ruled that Petitioner was precluded from introducing evidence in opposition to the motions on the basis of mediation confidentiality. The order granting the motions makes no mention of a ruling excluding any evidence proffered by Petitioner. Similarly neither the Order denying Petitioner's first ex parte application, nor its minute order denying Petitioner's second ex parte application contain a ruling excluding evidence." *Lund* at 1180. Pet. App. 33-35.

The Court found Petitioner's argument to be theoretical insofar as he was asking the Court that if he made a particular offer of proof and it was denied,

would that constitute a violation of due process. *In re Jody R.* 218 Cal.App.3d 1615, 1621-22 (1990) [appellate court generally does not address academic or moot issues]

The California Supreme Court denied review without opinion, on January 12, 2011 (Case S187992). Pet. App. 43. Thereafter, the instant petition was filed.

REASONS FOR DENYING THE PETITION

Review of this matter is not justified and lacks any factual or legal basis.

United States Supreme Court Rule 10 states that: "Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons". Accordingly, the Supreme Court only grants certiorari in a limited number of cases. As stated in *Magnum Import Co. v. Cory,* 262 U.S. 159, 163 (1923):

> The jurisdiction to bring up cases by certiorari from the Circuit Courts of appeals was given for two purposes, first to secure uniformity of decision between those courts in the [then] nine circuits and second to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

The following, from United States Supreme Court Rule 10, although neither controlling nor fully measuring

the Court's discretion, indicate the character of the reasons the Court considers:

> *(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;*
>
> *(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;*
>
> *(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

A. PETITIONER DID NOT SUFFER AN INJURY IN FACT, AS HE WAS NOT PRECLUDED FROM PRESENTING EVIDENCE FROM THE MEDIATION AND THEREFORE LACKS STANDING.

Article III, § 2, of the Constitution restricts the federal "Judicial Power" to the resolution of "Cases" and "Controversies." That case-or-controversy

requirement is satisfied only where a plaintiff has standing. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

In order to have Article III standing, a plaintiff must adequately establish: (1) an injury in fact (*i.e.*, a "concrete and particularized" invasion of a "legally protected interest"); (2) causation (*i.e.*, a "'fairly . . . trace[able]'" connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (*i.e.*, it is "'likely'" and not "merely 'speculative'" that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (calling these the "irreducible constitutional minimum" requirements).

Here, Petitioner has not been harmed and therefore, lacks standing. Petitioner was never precluded from presenting evidence from the mediation to support his claim. The California mediation statutes, which Petitioner alleges violate due process, were never even applied by the trial court.

The record in this matter is clear. On November 13, 2008, Respondent moved to enforce the settlement agreement entered into on August 04, 2008. This was the first time Petitioner tendered that he was an involuntary participant to the mediation.

In Petitioner's lengthy opposition to the motion to enforce the settlement, he presented numerous statements made by Packard. This is evidenced in the following excerpts from the Opposition to the Motion to Enforce Settlement, with respect to an alleged

conversation between Petitioner and his former counsel regarding the mediation:

> MR. PETITIONER immediately stated words to the effect of: "*If this is mandatory, I'll go. If not, I won't.* MR. PACKARD responded with words to the effect of: "*If you don't go, it will hurt your case.*" In response, MR. PACKARD said nothing, but merely laughed and walked away. Resp. App. 25b-26b.

The only authentication for the statement and conduct of Packard was a self-serving declaration submitted by Petitioner. The statements, as was pervasive throughout Petitioner's declaration, were riddled with hearsay. Despite the evidentiary issues, Petitioner was allowed every opportunity to present such evidence. The Court did not indicate, anywhere in the record, that these statements were not considered and/or precluded.

On November 25, 2008, Petitioner filed an ex parte application with the court to reconsider and set aside the order enforcing the settlement. The Court denied the Application, but not based on any evidentiary preclusion; rather, the court denied the application on procedural and substantive grounds holding Petitioner did not properly present a motion for reconsideration under California Code of Civil Procedure section 1008. The Court further expressly stated that the record had been augmented to include evidence of Packard's reduction of fees. No evidentiary ruling was issued.

In another attempt to nullify the valid settlement agreement, Plaintiff filed a second ex parte application. The Court considered the proposed

testimony of Mediator Kelly and still found no reason to disturb the ruling on the Motion to Enforce Settlement.

Absent from the record is any application of either California Evidence Code §§ 1119 and 1123. To the contrary, the record reflects that the court took into account the testimony of Kelly, at face value, when rendering its decision stating "*Let's assume we have that testimony from Mr. Kelly entirely supporting the plaintiff's claim...*" Resp. App. 18b-21b. The trial court found the argument to be unpersuasive.

Fatal assumptions pervade the instant Petition. Specifically, Petitioner was not precluded from presenting evidence from the mediation; the court never applied California Evidence Code §§ 1119 and/or 1123 to preclude evidence from the mediation; and, the court did not enforce the settlement based on the admission and/or preclusion of evidence from the mediation.

Accordingly, this Court does not get to the question of whether Petitioner was denied due process, because the facts giving rise to such assertions are lacking. Petitioner's posturing as to what would have or could have resulted, under various factual scenarios, is insufficient basis to grant review on a petition for certiorari by this Court.

This Petition is effectively a request for an advisory opinion, which should be interpreted as: "If Petitioner had been precluded from presenting evidence from the mediation, would such preclusion constitute a due process violation?" This Court does not issue advisory

opinions, except in very limited circumstances. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983)[3].

B. PETITIONER MISREPRESENTS THE RECORD AND FACTS OF THIS MATTER.

This Court has emphasized that certiorari is not appropriate when the constitutional question proposed by the petitioner is not fairly presented by the record, *Rogers v. United States*, 522 U.S. 252, 253 (1998), "is not presented with sufficient clarity," *Mclanahan v. Morauer & Hatzell*, 404 U.S. 16 (1971); or when "the totality of circumstances disclosed fails to support the substantial due process issues tendered in the petition for certiorari. *Boldonado v. California*, 366 U.S. 417 (1961).

The record here is clearly misrepresented by Petitioner. There is no evidence that Petitioner was precluded from proffering evidence from the mediation in support of his claim to set aside the mediation. Petitioner has not fairly and accurately presented this matter and, on that basis alone, review can and should be denied.

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[3] By refraining from deciding cases that rest on an adequate and independent state ground, federal courts show proper respect for state courts and avoid rendering advisory opinions. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983)

C. THIS PETITION DOES NOT PRESENT AN IMPORTANT QUESTION OF LAW.

Rule 10 admonishes the petitioning party that "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of properly stated rule of law."

Here, the question posed to the court does not meet the requisites for review. First, Petitioner was not precluded from presenting evidence from the mediation on account of California's "strict" mediation confidentiality statutes. Any review of this hypothetical and factually unique scenario would be an exercise for scholarly or academic pursuits.

As this Court so clearly stated, a federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. *Magnun Import Co. at 163.*

Petitioner is veiling a question of fact, whether he was extorted by his attorney, as a question of law, review of which is imprudent. *NLRB v. Hendricks City. Rural Electric Corp.*, 454 U.S. 170, 176 (1981) citing *Rudolph v. United States,* 370 U.S. 269 (1962); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

Second, review of this hypothetical question would have no benefit to any individuals other than those directly involved in the subject action. This Court has held that certiorari is inappropriate when the dispute

involves, not a question of law, but rather a factual matter that is "of no importance save to the litigants themselves." *Rudolph* at 270.

To be sure, counsel has cited no cases in which this unique factual issue has ever been presented i.e. a litigant seeks to revoke his acquiescence to a settlement, and is prevented from doing so based on mediation confidentiality. Again, that hypothetical scenario would not even apply to this case, as the court did not issue an evidentiary preclusion order.

To reach the hypothetical question posed by Petitioner, this Court would have to manifestly disregard the record of this matter. This Court would first have to overlook that the record does not reflect that Petitioner was ever precluded from presenting evidence. This Court would have to disregard that the trial court considered Mediator Kelly's proposed testimony. This Court would also have to dismiss that the trial court did not base its ruling to enforce the settlement on any evidentiary grounds. Upon closer examination, this purported question of law is ultimately one of fact and would thus serve no benefit "save to the litigants themselves." *Rudolph* at 270.

Finally, Petitioner attempts to manufacture a conflict of law between California Evidence Code §§ 1119, 1123, and holdings of this Court, where no such conflict exists.

Petitioner cites to this Court's holding in *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), a case which is clearly distinct from the matter at hand. In *Mullane*, a trust company in New York, which had exclusive management and control of a common trust

fund, petitioned for a judicial settlement of accounts. The trust company sent notice of the petition solely by publication in a local newspaper. This Court addressed whether the State had an interest and right to provide means to close the trusts; whether the notice by publication was sufficient; and, whether such means would deprive due process to those known and unknown persons of interest. *Id.*

Petitioner fails to properly frame how or why the California statutes, allegedly at issue, conflict with the holding in *Mullane*. Here, Petitioner is alleging that his due process rights were cut off by a "statutory scheme" stemming from California evidentiary law concerning the mediation privilege. In *Mullane*, this Court addressed whether due process rights were abrogated by a publication notice. The only similarity between the two cases is that there are allegations of due process violations, an argument which is virtually ubiquitous in writs for certiorari.

This case does not involve a "statutory scheme"; rather, valid evidentiary statutes, none of which are at issue given the underlying record. Second, this case does not involve notice by publication to known and unknown persons of interest. Finally, there are no jurisdictional issues at play here. Thus, there is no basis to find any conflict between the California evidentiary statutes and/or the California Court of Appeal ruling in *Lund v. Chan* and the holding and *Mullane*.

Further, Petitioner alleges, without merit, that the California mediation statutes at issue conflict with the holding from *Hall v. Mattel* (2008) 552 U.S. 576. In *Hall*, this Court addressed whether a party could

supplement grounds to vacate and/or modify an arbitration award, established under the Federal Arbitration Act ("FAA"), by contract. This Court held that the FAA's ground for prompt vacatur and modification of awards are exclusive.

Here, there is no conflict with *Hall*. This case neither involves an arbitration award and/or an arbitration contract provision that affects the scope of judicial review. It is uncertain how judicial review of a settlement agreement, entered into pursuant to mediation, would violate the FAA, which governs arbitrations.

Finally, Petitioner cites Texas and Virginia statutes that differ from the California statutes at issue. Conflicting statutes amongst states is not a valid basis for review on certiorari. United States Supreme Court Rule 10 (b)[4]. It appears as if Petitioner advocates some sort of change in legislation, for which this is an inappropriate avenue.

D. THE CALIFORNIA COURT OF APPEALS' RULING WAS PROPER.

The California Court of Appeals made a proper ruling in holding that the trial court did not err in enforcing the settlement. Petitioner alleged that Packard extorted him for his causes of action, purportedly constituting stolen property. The Court of

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[4] United States Supreme Court Rule 10 (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Appeals properly found that the causes of action were not surrendered to Packard, and thus, a claim for extortion against Packard could not prevail.

Petitioner alleged that he was entitled to rescind the settlement agreement under theories of economic duress, undue influence and fraud, perpetrated by Packard. The Court of Appeals properly found that Packard was not a "jointly interested" party to the settlement, and thus, the aforesaid grounds for rescission fail.

Finally, the Court of Appeals held, as is contended herein by Respondent, that Petitioner was not denied due process, by virtue of the California mediation statutes, because the record clearly showed Petitioner was never precluded from presenting any evidence from the mediation. In fact, the trial court, in ruling on the second ex parte application, considered the proposed testimony of Mediator Kelly and determined it would not affect the enforcement of the settlement. Thus, the California Court of Appeals' ruling was sound.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully Submitted,

Kenneth D. Simoncini, Esq.
Counsel of Record
SIMONCINI & ASSOCIATES
1694 The Alameda
San Jose, CA 95126
Telephone: (408) 280-7711
Fax: (408) 280-1330
Email: kds@simoncini-law.com

Counsel for Respondent
Norma Tree Service

APPENDIX

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Appendix A: Declaration of Kenneth D. Simoncini in Support of Motion to Enforce Settlement Pursuant to C.C.P. §664.6., In the Superior Court of the State of California, In and for the County of Santa Clara (October 20, 2008) 1b

Appendix B: Letter to David Packard from Bill Chan with attached W-9 form (August 5, 2008) 9b

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APPENDIX A

KENNETH D. SIMONCINI, ESQ. (#145586)
KERRI A. JOHNSON, ESQ. (#138344)
MARIE C. BALLON, ESQ. (#227191)
SIMONCINI & ASSOCIATES
Attorneys At Law
1694 The Alameda
San Jose, CA 95126-2219
Telephone: (408) 280-7711
Facsimile: (408) 280-1330

Attorneys for Defendants, Cross-complainant and Cross-defendant NORMA TREE SERVICE and NORMA GONZALEZ

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

Case No.: 1-06-CV072392

[Filed October 20, 2008]

BILL CHAN,	)
	)
Plaintiff,	)
	)
v.	)
	)
KATHLEEN MARIE LUND and CRAIG T. LUND, individually and as Co-Trustees of LUND FAMILY TRUST	)

and DOES 1 through 20,

Defendants.

KATHLEEN MARIE LUND and CRAIG T. LUND, individually and as Co-Trustees of LUND FAMILY TRUST and DOES 1 through 20,

Cross-Complainant

v.

NORMA TREE SERVICE and ROES 1 through 20, inclusive,

Cross-defendants.

DECLARATION OF KENNETH D. SIMONCINI IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT PURSUANT TO C.C.P. §664.6.

Date: November 13, 2008
Time: 9:00 a.m.
Dept.: 10

I, KENNETH D. SIMONCINI declare:

1. I am the principal in the law firm of Simoncini & Associates, counsel for defendants NORMA TREE SERVICE and NORMA GONZALES in the above entitled matter. If called upon to testify concerning the facts stated, I was present at the subject mediations and specifically the mediation/settlement conference on August 4, 2008, held before Kevin Kelly, acting

through the presiding Judge Neal Cabrinha pursuant to the order of the Court, which trailed the trial scheduled to start on August 4th, to allow further settlement negotiations. I am prepared to state what I observed and occurred at said mediation/settlement conference supporting a motion to enforce the settlement agreement entered on that date pursuant to the terms of CCP664.6.

2. This is a boundary tree cutting claim fueled by longstanding disputes between neighbors on Fallen Leaf Lane, Los Altos, California. Neighbors, plaintiff Bill Chan and defendants, the Lunds, have had issues between them since 1993, when the Lunds so aggressively cut Mr. Chan's photinia hedge on Mr. Chan's side of a grape stake fence between the Chan and Lund Properties that the hedge died. Mr. Chan then planted 14 Leyland Cypress trees, which are fast growing, have a very large spread and have been relatively un-maintained for seven and a half years on that same border. The Lunds contend those Cypress dropped branches and debris on their property; obscured the Lunds ability to see traffic on the street, and were left overgrown into the Lunds property.

3. Defendant Lunds hired Norma Tree to trim the cypress and do other tree trimming on the Lunds property. On May 3, 2005, employee Jose Contrearas, picked up two day laborers to perform the work requested by the Lunds.

4. According to Norma Tree's arborist Torrey Young, the subject overgrown Leyland cypress trees had pre-existing cypress canker before any cutting that occurred on either on May 3rd or 4th, 2005. Nothing Norma Tree did or did not do that day caused

or contributed to that canker condition. Mr. Young will testify that the subject trees have returned to their pre-incident condition and that any "actual damage" to the trees can be corrected by a tree maintenance crew at a cost of $350.00 to $500.00. We entered into settlement discussions with the above facts on the record.

5. The parties stipulated to mediate the claim as the ADR alternative. The stipulated mediator was Kevin Kelly. Mr. Kelly conducted 2 mediations [October 30, 2007 and March 19, 2008]. Pursuant to the Court's orders, Mr. Kelly held a Mandatory Settlement Conference on July 15, 2008, and further mediation/settlement conference on August 4, 2008, while the Court trailed the subject August 4, 2008, trial date.

6. A settlement was entered into on August 4, 2008, signed by plaintiff Bill Chan. Mr. Kelly, wrote the Confirmation of Settlement as a Result of Mediation, a copy of which is attached hereto as Exhibit A. Counsel and Mr. Chan contributed to the language in the agreement. The carriers for the Lunds (State Farm) and Norma Tree (Colony) were present at the August 4, 2008 settlement conference and agreed to pay the sum of $36,100 on behalf of said defendants. The agreement contained the following pointed relevant provisions:

> "The monetary settlement reached in this case is not conditioned or contingent On the parties Lunds or Chang reaching or entering into a stipulated injunctive order."

"The undersigned parties and their legal representatives agree that this settlement Agreement is intended to be a binding settlement agreement and comply with CCP 664.6 and is exempt from confidentiality agreements applicable to the Mediation of the above captioned case."

7. Mr. Kelly explained each and every aspect of the settlement agreement to the parties, including Mr. Chan. I observed and heard nothing which would indicate Mr. Chan had reservations with respect to the monetary settlement as to Norma Tree/Norma Gonzales and the Lunds or was not giving his consent freely. Mr. Kelly explained that the settlement was intended to be a binding settlement agreement and comply with CCP664.6.

8. I received a W-9 signed by Bill Chan, a copy of which is attached hereto as Exhibit B. I ordered the settlement draft in the amount of $25,000, which was received. A copy dated August 7, 2008 is attached hereto as Exhibit C.

9. On August 6, 2008, I received a letter from Sal Sunseri counsel for the Lunds enclosing a Request for Dismissal to be signed by plaintiff's counsel, proposed Release in Full of All Claims and Rights and a Stipulation for Injunctive Orders.

10. On August 12, 2008, I received a letter from David Packard to counsel in which Mr. Packard advised that Mr. Chan had "one reservation and qualification", i.e. about the stipulation for injunctive relief issues only.

11. On August 20, 2008, I received a revised version of the Release of All Claims and Rights from Mr. Sunseri's office. I made a suggestion in writing to Mr. Packard and Mr. Sunseri to reference the lawsuit number in the final form of the Release of All Claims and Rights.

12. I was not involved in the injunctive relief portion of the settlement, and had no information as to how that was proceeding as the settlement on behalf of Norma Tree/Norma Gonzales was strictly monetary.

13. On September 11, 2008, five weeks later, I received a letter from Mr. Sunseri to Mr. Packard indicating that Mr. Chan was either substituting himself or a new attorney. I had been out of the office and not received Mr. Sunseri's calls in that regard.

14. On September 19, 2008, I received a letter from Mr. Packard, which informed that Mr. Chan terminated his representation on August 15, 2008 and that he intended to substitute Mr. Tichinin. A substitution was attached.

15. I have no information that the Substitution was filed; but subsequently received an endorsed filed Substitution filed September 22, 2008.

16. On September 24, 2008, my office received a "Declaration of Bruce Tichinin re: Good Cause Not to Dismiss After Settlement."

17. On its face, the declaration acknowledges that a settlement was entered.

18. The Court trailed the trial one day to allow settlement negotiations to continue. Judge Cabrinha and Mr. Kelly spoke regarding the Court's actions in that regard. The injunctive relief portion of the case had been the impasse at each mediation previously held. On August 4, when there was agreement between Mr. Chan and the Lunds as to how to implement injunctive relief, the monetary issues were settled for $36,100; $25,000 from Norma Tree/Norma Gonzales carrier Colony and $11,000 from State Farm, Lunds carrier.

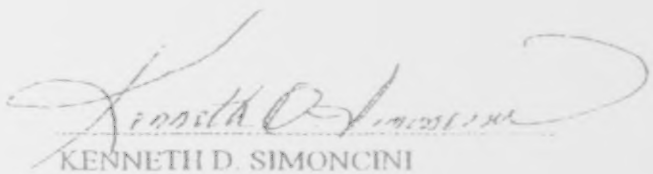
19. I have no information or belief from my attendance observing the proceedings and Mr. Chan at the mediation/settlement conference that Mr. Chan's agreement to settle the case was "not free" as characterized by Mr. Tichinin, who was not present. I am informed that the Court trailed the trial and required the parties and counsel to attend the mediation/settlement conference in the interests of settling the case.

20. Mr. Chan did not contact Mr. Tichinin until two weeks after the settlement according to Mr. Tichinin's declaration. That behavior indicates the settlement was in force until then. Mr. Tichinin's opinion aside on the merits of the case gives rise to a conclusion that "buyer's remorse" as to Mr. Chan was influenced by his contact of Mr. Tichinin, another attorney. That change of mind is insufficient to set aside a binding settlement agreement which was freely entered at the time the terms of the agreement were decided, written, to which Mr. Chan contributed and executed.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is

true and correct to the best of my knowledge. As to those matters stated to be upon information and belief, such statements were made upon a good faith belief as to their truthfulness.

Executed at San Jose, CA, this 20th day of October, 2008.



KENNETH D. SIMONCINI

APPENDIX B

Two pages total

David Packard
706 Cowper Street
Palo Alto, CA 94301
(650) 324-1432 fax

Hi Dave,

Please find attached the W-9 form requested by Mr. Simoncini at yesterday's mediation.

Best regards,

Bill Chan
August 5, 2008

Form W-9 (Rev. October 2007) Department of the Treasury Internal Revenue Service	**Request for Taxpayer Identification Number and Certification**	Give form to the requester. Do not send to the IRS.

Print or type
See Specific Instructions on page 2.

Name (as shown on your income tax return) BILL S. CHAN	
Business name, if different from above	
Check appropriate box: ☒ Individual/Sole proprietor ☐ Corporation ☐ Partnership ☐ Limited liability company. Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) ➢..... ☐ Other (see instructions) ➢.....	☐ Exempt payee
Address (number, street, and apt. or suite no.) PO BOX 62046	Requester's name and address (optional)
City, state, and ZIP code SUNNYVALE, CA 94088-2046	
List account number(s) here (optional)	

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Social security number
or
Employer identification number

Part II **Certification**

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and

2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and

3. I am a U.S. citizen or other U.S. person (defined below).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to

sign the certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here	Signature of U.S. person ➢ [signature] Date ➢ 08/03/2008

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),

2. Certify that you are not subject to backup withholding, or

3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also

certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,

- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,

- An estate (other than a foreign estate), or

- A domestic trust (as defined in Regulations section 301.7701-7).

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

• The U.S. owner of a disregarded entity and not the entity,

APPENDIX C

[p.30]

TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

Court of Appeal Case No. H034196
Superior Court Case No. 1-06-CV-072392

[Dated March 11, 2009]

BILL CHAN,

Appellant/Plaintiff,

vs.

CRAIG T. LUND, et al.,

Respondents/Defendants.

ANd RELATED CROSS-ACTIONS.

Volume V

Page 30-47

REPORTER'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT STATE OF CALIFORNIA, COUNTY OF SANTA CLARA BEFORE THE HONORABLE NEAL A. CABRINHA, JUDGE

A P P E A R A N C E S:

FOR THE APPELLANT/PLAINTIFF:

BRUCE TICHININ, ESQ.
Law Offices of Bruce Tichinin
17775 North Monterey Street
Morgan Hill, CA 95037
408.779.9194

Appearances continued on next page.

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FOR THE RESPONDENT/DEFENDANT LUND:
Stenberg, Sunseri, Roe,
Pickard & Rudy
75 East Santa Clara Street
Suite 1350
San Jose, CA 95113
408.288.6216

FOR THE RESPONDENTS/DEFENDANTS NORMA TREE SERVICE & NORMA GONZALEZ:
Simoncini & Associates
1694 The Alameda
San Jose, CA 95126
408.280.7711

[p.32]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
SANTA CLARA COUNTY JUDICIAL DISTRICT
DEPARTMENT NUMBER 10
BEFORE HONORABLE
NEAL A. CABRINHA, JUDGE

Case No: 1-06-CV-072392

BILL CHAN,

Plaintiff,

vs.

CRAIG T. LUND, et al.,

Defendants.

AND RELATED CROSS-ACTIONS

EX PARTE MOTION

TRANSCRIPT OF PROCEEDINGS HELD ON:
WEDNESDAY, MARCH 11, 2009

APPEARANCES:

FOR THE PLAINTIFF:
BRUCE TICHININ, ESQ.
Law Offices of Bruce Tichinin
17775 North Monterey Street
Morgan Hill, CA 95037

408.779.9194

FOR LUND DEFENDANTS:
SALVATORE J. SUNSERI, ESQ.
Steinberg, Sunseri, Roe,
Pickard & Rudy
75 East Santa Clara Street
Suite 1350
San Jose, CA 95113
408.288.6216

FOR NORMA TREE SERVICE & NORMA GONZALES DEFENDANTS:
MARIE BALLON, ESQ.
Simoncini & Associates
1694 The Alameda
San Jose, CA 95126
408.280.7711

OFFICIAL COURT REPORTER:
MELODY DICKINSON, CSR No. 10299

* * *

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because it's not clear to me from your ruling, which made no mention of Mr. Kelly's proffered testimony or the constitutional argument, that you understood me to be making an offer of proof of Mr. Kelly's corroborating testimony.

THE COURT: So the two key facts from plaintiff's standpoint are that he was induced to enter this agreement because his attorney said he'd reduced his

fees by $10,000 and he would not represent him at trial, okay.

MR. TICHININ: Your Honor, I don't think he relied at all on the reduction in fees. It was the threat not to represent him at trial that made the difference.

THE COURT: Okay. That's the -- the gist of plaintiff's claim is that his attorney told him that if you don't take this deal, I'm not going to represent you at trial and you can try it on your own.

MR. TICHININ: Exactly. Right.

THE COURT: Right?

MR. TICHININ: Right.

THE COURT: And the evidence would be that the defendants knew nothing of this when the agreement was signed?

MR. TICHININ: Yes, that's right, Your Honor.

THE COURT: And then the plaintiff said I'm not going to act in accordance with the agreement because I was under duress when I signed it and Kevin Kelly would come to court and testify that, yes, he heard the plaintiff's attorney say if he didn't take this deal, he would not represent him at trial the following day.

Let's assume we have that. testimony from Mr. Kelly

[p.45]

entirely supporting the plaintiff's claim. I don't think in the law the defendants lose their deal. They've got a deal with the plaintiff. This is a case for money. The plaintiff's Complaint is for $78,000 in damage on account of the defendants coming onto his land and cutting 14 Cypress trees. The defendants deny liability but have put together a total of some $37,000 or so which the plaintiff accepted on the apparently fourth day of mediation which took place over a number of months. And that was the subject of the November 13 motion for settlement which I granted. I see no reason since then to rethink this, to reconsider it, whether on plaintiff's motion or the Court's own motion, so I'm going to deny the ex parte application that you present today and I'm going to sign the order that's been submitted by Mr. Sunseri on the November 13th hearing. And if you'd like to file this, Mr. Sunseri.

MR. SUNSERI: I will do that, Judge.

THE COURT: Today is March 11th.

MR. TICHININ: Thank you, Your Honor.

THE COURT: For the record, Mr. Tichinin, I believe you've withdrawn your consent to the form of the order which you had originally given, but you filed a document here that indicates that you've withdrawn your consent or approval of the order.

MR. TCHININ: That's correct.

THE COURT: Okay. Thank you very much.

MS. BALLON: Thank you, Your Honor.

MR. TICHININ: Your Honor, will the ex parte application be filed or should I file it?

* * *

[p.47]

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

I, MELODY DICKINSON, HEREBY CERTIFY: That I was appointed by the Court to act as Official Court Reporter in the above-entitled action; that I reported the same in stenotype and thereafter transcribed the same into typewriting as appears by the foregoing transcript; that said transcript is a full, true and correct statement of the proceedings and evidence to the best of my ability.

I further certify that I have complied with CCP 237 (A) (2) in that all personal juror identifying information has been redacted, if applicable.

Dated this 18th day of March, 2009.

_____
Melody Dickinson, CSR No. 10299
Certified Shorthand Reporter

APPENDIX D

Law Offices of
BRUCE TICHININ, INC.
BRUCE TICHININ (SBN 52859)
17775 North Monterey Street
Morgan Hill, CA 95037
Telephone: (408) 779-9194
Facsimile (408) 778-2702

Attorney for Plaintiff and Cross-Defendant
BILL CHAN

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA
UNLIMITED JURISDICTION**

No. 106-CV-072392

[Dated October 29, 2008]

BILL CHAN)
)
Plaintiffs,)
)
vs.)
)
CRAIG T. LUND, et al,)
)
Defendants.)
)
AND RELATED CROSS-ACTIONS)
)

DECLARATION OF PLAINTIFF BILL CHAN IN OPPOSITION TO MOTIONS OF DEFENDANTS LUND AND NORMA TREE SERVICE TO ENFORCE SETTLEMENT PURSUANT TO CCP § 664.6

Date: November 13, 2008
Time: 9:00 a.m.
Dept.: 10
Judge: Hon. Neal A. Cabrinha

BILL CHAN declares:

1. I am the Plaintiff in this action.

2. I submit this Declaration in opposition to the dual motions of Defendants LUND and Defendant NORMA TREE SERVICE that seek to enforce the Settlement Agreement that was entered into by me without real and free consent, but with only apparent consent, as described hereafter.

3. I filed this suit for damages for trespass to trees after the Defendants LUND, my neighbors on Fallen Leaf Lane in Los Altos, California, cut trees on my property for the third time.

4. On October 30, 2007, the first mediation in this case was held, at the offices of the mediator, KEVIN KELLY, ESQ. in Redwood City, California.

5. A second mediation was held on November 27, 2007, and a third on March 19, 2008. A

fourth mediation was held on July 15, 2008, in place of a mandatory settlement conference. At these sessions, the parties agreed provisionally to monetary settlement at the monetary amounts that are set forth in the subsequent document, dated August 4, 2008 and entitled "Confirmation Of Settlement As A Result Of Mediation," a true copy of which is attached as **Exhibit 1** (previously and sometimes hereafter "Settlement Agreement"). The provision required to make the monetary amounts effective was that agreement would also be reached as to the terms of a stipulation for an injunction concerning the rights and duties of the parties regarding trees on my property in the future.

6. In May 2008, MR. PACKARD prepared a proposed form of terms for this stipulation for an injunction and forwarded it for review and response by the LUNDS. The counterproposal from the LUNDS was, in my opinion, so severely invasive of my rights that forward motion on agreement between the parties for the stipulation for an injunction stopped.

7. A fourth mediation was held on July 15, 2008, in place of a mandatory settlement conference, because the Defendants LUND were on vacation. No further agreement was reached.

8. Trial of this case was set for August 4, 2008, approximately three weeks after the unsuccessful fourth mediation.

9. On July 25, 2008, just five business days before the scheduled start of trial, at the end of the deposition of an expert witness in the office of KENNETH SIMONCINI, ESQ., the attorney for Defendant NORMA TREE SERVICE, SAL. SUNSERI, the attorney for Defendants LUND, said to my then-attorney of record, DAVID PACKARD, ESQ., words to the effect of: *"There is going to be a delay in the trial for another mediation. I am sure I can get my clients to agree."* MR. PACKARD stated that he agreed. I immediately stated words to the effect of: *Wait a second! I object!"* MR. PACKARD then whispered to me words to the effect of: *"Let's just go along with this."*

10. Because we were in the presence of MR. SUNSERI, I did not want to say anything further until we were out of his presence. Because the deposition had just ended, the next thing that happened was that MR. PACKARD and I left MR. SIMONCINI'S downstairs conference room office and entered its parking lot. I immediately stated words to the effect of: *"If this is mandatory, I'll go. If not, I won't."* MR. PACKARD responded with words to the effect of: *"If you don't go, it will hurt your case."* I responded with words to the effect of: *"MR. KELLY must expect to be paid. I won't pay and I won't attend."* In response, MR. PACKARD

said nothing, but merely laughed and walked away.

11. On Sunday, August 3, 2008, I met with MR. PACKARD to prepare for trial, but the first topic raised was the settlement conference or mediation scheduled for the next day. I again said that I was not going to appear. MR. PACKARD again pressured me to attend, stating that if I did not it would reflect upon his reputation, and that the Judge in the case would give him a hard time at trial.

12. Frustrated, confused and feeling betrayed by MR. PACKARD, I told him that I might call Judge Cabrinha to see how this situation had come about , despite my lack of knowledge or consent.

13. MR. PACKARD said that Judge Cabrinha would not take my call.

14. MR. PACKARD then said that if I did not attend, he would not represent me at the trial, but that I could represent myself. Of course, I viewed this as exceedingly coercive, because I, as a layman, I had no expectation that I could successfully represent myself at trial, and, even if I had the education, training and experience to try the case as an attorney, I had not engaged in any preparation to be the attorney for my case at trial, in reliance on the fact that MR. PACKARD had

* * *

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration is executed on October 29, 2008 at Los Altos, California.

Bill Chan

BILL CHAN